IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

KYLE DAVENPORT,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

ORDERS OR JUDGMENTS OF THE COURTS BELOW

As heretofore stated, the United States Circuit Court of Appeals for the Sixth Circuit did not render a written opinion but the order of that Court is found in the record filed herewith at page 213.

The judgment of the United States District Court for the Middle District of Tennessee, appears in the record filed herewith at page 10-12 inclusive.

II

JURISDICTION

(1) The date of the decision and judgment of the United States Circuit Court of Appeals for the Sixth

Circuit to be reviewed is February 17, 1945, and this petition has been filed within the time provided by statute (R. p. 213).

(2) The statutory provision, which is believed to sustain the jurisdiction of this Court, is United States Code, Annotated, Title 28, Section 347, Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938.

(3) Petitioner was convicted in a criminal case under certain Federal Statutes and regulations promulgated pursuant thereto, and under United States Code, Annotated, Title 28, Section 347; Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, the only method to review the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit is by petition to this Court for the writ of certiorari.

III

STATEMENT OF THE CASE

This has heretofore been stated in the preceding petition Sec. 1 (Supra pp. 1-5) which is here adopted and made a part of this brief. It is unnecessary to review the facts appearing in the Bill of Exceptions in this case, (R. pp. 24-189), except that it may be pointed out that defendant strenuously denied the charges made against him in the indictment and supported his plea of not guilty with a large number of witnesses whose testimony, if believed, would completely exonerate petitioner of the charges made against him in the indictment.

Attention is called to the facts in this case only for the purpose of showing that the trial court erred in as-

suming the guilt of the defendant in a criminal case where circumstantial evidence is relied upon by the Government, if a proper interpretation of said instruction shows such an assumption by the trial court.

IV

SPECIFICATION OF ERROR

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the charge of the trial court on circumstantial evidence, already set out in the preceding petition, did not constitute reversible error and in affirming the judgment of the United States District Court for the Middle District of Tennessee in this case (R. p. 213).

V

ARGUMENT

Summary of Argument

POINT A—The charge of the trial court on circumstantial evidence was an invasion of the province of the jury and erroneous in that it assumed a defendant in a criminal case in a trial court is guilty where the Government relies on circumstantial evidence for conviction.

POINT B—The exception taken by petitioner to the trial Court's charge on circumstantial evidence was sufficient.

POINT C—The concluding or last paragraph of the trial court's charge on circumstantial evidence did not cure the preceding part of the charge on the same subject, wherein the trial court assumed that a defendant in a criminal case was guilty where the Government relied on circumstantial evidence as aforesaid.

POINT A

The charge of the Trial Court on circumstantial evidence was an invasion of the province of the jury and erroneous in that it assumed a defendant in a criminal case in a Trial Court is guilty where the Government relies on circumstantial evidence for conviction.

It will be noted that in the first part of the charge on circumstantial evidence, the trial court makes the following observations, among others, "*Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime.*"; "*Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind.*"; "*Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt.*"

The Court then states by way of illustration, that the kind of animal which has previously passed along a certain way can be determined by the tracks it left; that if the animal was a horse or cow, its identity or kind could be determined by anyone examining the tracks, who was familiar with these animals. The Court further stated that the tracks might be so plain it would be easy to identify the animal that had passed or the tracks might be obscure, thereby making it difficult to identify the animal or the specie of animal making them.

The Court next proceeded to apply the illustration to criminal cases as follows:

> "So it is in the criminal law, the track which the *criminal* left if circumstantial evidence is relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not

identify the *criminal* beyond a reasonable doubt." (Italics ours) (R. p. 204).

It seems apparent from the trial court's charge that the court assumed circumstantial evidence was to be used for the purpose of legally establishing the guilt and identity of an already admitted criminal. This is shown by the Court's charge that the tracks left might be sufficiently plain to establish the guilt of the "criminal" or on the other hand they might be so obscure or faint as to fail to identify the "criminal" beyond a reasonable doubt. In other words, it is submitted that the charge presupposes and assumes an accused at all events, to be a criminal, the only question left to the jury being whether the criminal left sufficiently plain tracks to legally establish his guilt or to identify him as a criminal. It is a well settled principle of criminal law that a defendant in a criminal case in a trial court is presumed to be innocent until he is shown to be guilty beyond a reasonable doubt, instead of being assumed a criminal and therefore guilty.

Allen v. *U. S.*, 150 U. S. 551; 37 L. Ed. 1179.

An assumption by the court of any fact which is in dispute constitutes an invasion of the province of the jury.

Hicks v. *U. S.*, 150 U. S. 442; 37 L. Ed. 1137, 1141.
Allen v. *U. S.*, 150 U. S. 551; 37 L. Ed. 1179.
Blanon v. *U. S.*, 213 Fed. 320.
Menefee v. *U. S.*, 236 Fed. 826.
Conda v. *U. S.*, 166 Fed. 91.
Foster v. *U. S.*, 188 Fed. 305.
Rudd v. *U. S.*, 173 Fed. 912.

In the case of *Hicks* v. *U. S.*, *Supra*, the trial judge charged that the testimony of defendant should be viewed

in the light of his interest and the other evidence. Commenting upon this charge, this court said:

> "The obvious objection to this suggestion is in its assumption that the other witnesses whose statements contradicted those of the accused were 'telling the truth'."
>
> *Hicks* v. *U. S.*, 37 L. Ed. 1141.

Of course in the case at bar the vital and ultimate issue of fact was whether the defendant was guilty or innocent, that is to say whether he was a *criminal*, and there was abundant evidence that he was not guilty of the offenses charged.

The fact that the law was thus stated by the trial court abstractly or by way of illustration does not render it less erroneous. It is evident that the trial court intended the illustration or abstract proposition of law to be applicable to the case on trial and petitioner, otherwise, there would have been no purpose in giving same as a part of the instructions. In the case of *Allen* v. *U. S.*, *supra*, the trial court gave to the jury the following abstract proposition of law:

> "Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time, determining the law, determining the facts as a judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and it is given to him because it is the

law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he cannot escape except by the use of that deadly means, or in your judgment, taking into consideration his condition, there was reasonable ground to believe there was peril."

Allen v. *U. S.*, 37 L. Ed. p. 1182.

This court held that the foregoing excerpt from the charge of the trial court was reversible error in the following language:

"To direct the attention of the jury to the contemplation of the philosophy of the mental operations, upon which justification or excuse or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case as they appeared to the defendant at the time.

While it may be psychologically true that in every sane act, with whatever swiftness performed, there is involved the prior determination to do it, often inappreciably separated in time; yet when the defense in a case of homicide is justification or excuse or action in hot blood, the question is one of fact and must be passed on by the jury in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court. In view of such considerations a verdict might be reached in harmony with the results of scholastic reasoning upon the nature of things in general apart from the subject-matter, and yet be unjustified by the case in the concrete which the jury were impaneled to try."

Allen v. *U. S.*, 37 L. Ed. 1183.

There can be no doubt that the charge of the trial court on circumstantial evidence was very prejudicial to petitioner. This case was called for trial on June 6, 1944 and

the taking of the testimony of the witnesses began on June 7, 1944 (R. p. 23). It is believed that this court will judicially notice that June 6, 1944 was "D Day" or the date of the invasion of Normandy. The case was therefore tried at a time when the patriotic fervor of the people of the United States was rightly very high, but it was also tried at a time when it was unusually difficult for the jury to weigh the evidence dispassionately, because of the nature of the offense with which petitioner was charged.

As stated in the case of *Hicks* v. *U. S., supra,* (37 L. Ed. p. 1141) the jury properly gives great weight to the lightest word of the judge and on account of the conditions prevailing at the time of the trial, the comments of the trial court in the charge on circumstantial evidence, was especially prejudicial to petitioner.

POINT B

The exception taken by Petitioner to the Trial Court's charge on circumstantial evidence was sufficient.

A general exception to a designated portion of a trial court's charge is sufficient in criminal cases where it is necessary or useful to cite the entire passage of the charge containing the alleged erroneous excerpts.

U. S. v. *Adkinson,* 297 U. S. 157, 80 L. Ed. pp. 555, 557.
Allen v. *U. S., supra.*
Hicks v. *U. S., supra*

This court may even in exceptional circumstances in criminal cases notice obvious errors to which no exception was taken. In the case of *U. S.* v. *Adkinson, supra,* this court speaking through Mr. Justice Stone, now the Chief Justice, said:

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

U. S. v. Adkinson, 80 L. Ed. p. 557.

POINT C

The concluding or last paragraph of the Trial Court's charge on circumstantial evidence did not cure the preceding part of the charge on the same subject, wherein the Trial Court assumed that a defendant in a criminal case was guilty where the Government relied on circumstantial evidence as aforesaid.

A palpably incorrect statement of law by the Court cannot be cured by a conflicting or contradictory one which correctly states the law, unless the erroneous instructions are expressly withdrawn.

Mills v. *U. S.*, 164 U. S. 644, 41 L. Ed. 584.

Allen v. *U. S.*, 150 U. S. 559, 37 L. Ed. p. 1182.

Drossos v. *U. S.*, 2 Fed. (2nd) 538.

Glover v. *U. S.*, 147 Fed. 426, 77 C. C. A. 450.

Washington, etc. R. R. Co. v. *Varnell*, 98 U. S. 479, 25 L. Ed. 233.

The reason for the foregoing rule is well expressed in the case of *Drossos* v. *United States, supra*, decided by the Circuit Court of Appeals, Eighth Circuit. In this case Drossos was convicted of violating the White Slave Traffic Act. The District Court, in the charge to the jury, erroneously shifted the burden of proof to the defendant. In a subsequent paragraph the trial court correctly charged however that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt. The Government contended that the charge as a whole

was correct, but the case was reversed for said error by the said Circuit Court of Appeals, the Court saying:

> "It is, of course, also true, and well settled by the authorities, that a charge to a jury is to be considered as a whole, and that if the instructions as a series correctly state the law, then though one paragraph or one phrase standing alone may be defective, it will not constitute reversible error. But that is not the rule where two instructions are directly in conflict and one of them clearly erroneous and prejudicial, such as is presented here, for the jury will assume that the instructions are all correct and will as likely follow the incorrect as the correct instruction. See Branson's Instructions to Juries, 93; 16 Corpus Juris, pp. 1054 and 1055, and cases therein cited; 14 R. C. L. 777, 45."

CONCLUSION

Under Section II of the Petition for Writ of Certiorari, petitioner assigns as a reason for the allowance of the writ the last ground set out under Section 5, Sub-section (b) of Rule 38 of this court. In the case of *New York C. R. Co.* v. *Johnson*, 279 U. S. 311; 73 L. Ed. pages 706, 711, this court granted the writ of certiorari on the same ground as assigned by petitioner herein, because of improper argument by counsel for the Plaintiff below. It is believed that a palpably erroneous charge of the court falls within the same category as an improper argument by counsel to the jury.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the United States Circuit Court of Appeals for the

Sixth Circuit, rendered February 17, 1945, with instructions to grant a new trial.

Respectfully submitted,

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